In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1000

BEN G. MILTON D/B/A SERVICE CHECK COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question here is whether the issuer who sold money orders to a delinquent taxpayer is liable to the United States for the amount of such money orders, which it repaid to the taxpayer after the United States had seized the money orders in execution of a tax judgment and levy.

On August 6, 1958, the United States District Court for the Northern District of Ohio adjudged that Alex Shondor Birns owed $146,099.39 in unpaid income taxes. Before May 1961, a tax lien against Birns for an amount in excess of $7,300 was filed with the recorder of Cuyahoga County, Ohio, where Birns resided. (R. 8a–9a, 10a, 11a.) [1]

[1] "R." refers to the Appendix to petitioner's brief in the court of appeals.

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Petitioner is licensed to sell money orders to the public in Ohio. His principal place of business is in Akron, Summit County, Ohio. In May 1961, petitioner sold Birns eight money orders, directing the First National Bank of Akron to pay stated amounts totalling $7,300. The name of the payee was left blank on each money order, and Birns was authorized to fill in the payee's name. (R. 3a, 8a, 10a.)

On May 24, 1961, the Cleveland police took Birns into custody. In accordance with their usual practice, they seized the money orders, which were in his possession and still blank as to payee. On the same day, the United States obtained a writ of execution from the District Court for the Northern District of Ohio to attach the property of Birns held by the Cleveland police. Upon the United States' service of the writ on the Chief of Police, the police delivered the money orders to a United States deputy marshal in Birns' presence, but without his consent.

Birns was released from custody that same day. He immediately ordered petitioner and the drawee bank to stop payment. Two days later, on May 26, 1961, petitioner paid $7,300 to Birns.

The Internal Revenue Service subsequently entered its own name on the money orders as payee. On June 5, 1961, it presented them to the drawee bank for payment. The bank refused, notifying the United States of the stop-payment order. The United States then made demand on petitioner, who refused to honor the money orders. (R. 8a, 9a–10a.)

The United States instituted this action to recover the value of the money orders from petitioner. The

district court held (Pet. 9–16) that the United States was entitled to recover, since petitioner had no right to stop payment as against the United States. The court of appeals affirmed. (Pet. 17–18.)

The decision below is correct. There is no conflict in decisions, or any question of general importance. Further review would not be appropriate.

Tax liens extend to "all property and rights to property" of a taxpayer. Section 6321 of the Internal Revenue Code of 1954; *Glass City Bank* v. *United States,* 326 U.S. 265; *United States* v. *Eiland,* 223 F. 2d 118 (C.A. 4). Because the tax lien against Birns was properly on file at the county of his residence, it attached to his intangible assets, such as these money orders, the situs of intangibles being the owner's residence. *Walker* v. *Paramount Engineering Co.,* 353 F. 2d 445, 448 (C.A. 6).

The United States thus validly acquired possession of the money orders from Birns, and succeeded to his interest in them. *United States* v. *Sullivan,* 333 F. 2d 100, 116 (C.A. 3); *United States* v. *Eiland, supra.* The United States could then name itself payee,[2] and thereby become a *bona fide* holder under the Ohio law then applicable. Ohio Revised Code, Section 1301.01(T), *Stowe* v. *Branigan,* 28 Ohio L. Rep. 278, 7 Ohio L. Abs. 7 (App.); *O'Rourke* v. *Rock,* 29 Ohio L. Abs. 10 (App.).

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[2] *Burke* v. *Jenkins,* 128 Ohio St. 86, is not, as petitioner argues (Pet. 5), to the contrary. There, as the court of appeals noted (Pet. 17), the maker of the instrument had intended that a specific payee be named.

There is no merit to the argument (Pet. 5) that Ohio law requires the United States to employ a receiver to execute its judgment on intangibles. Federal and not State law controls; the seizure was authorized by Section 6331 of the Internal Revenue Code of 1954. *Hoye* v. *United States,* 277 F. 2d 116, 119 (C.A. 9); *United States* v. *Bowery Savings Bank,* 297 F. 2d 380 (C.A. 2). In any event, the appointment of a receiver under Section 2715.20 of the Ohio Revised Code, on which petitioner relies (Pet. 5, 25), is permissive rather than mandatory.

Nor is it material that petitioner claims (Pet. 7–8) he in good faith relied on Birns' alleged power to stop payment on bank money orders. There is no right to stop payment on money orders in the absence of fraud or failure of consideration, except by injunctive proceeding, see *Cross* v. *Exchange Bank,* 110 Ohio App. 219, 168 N.E. 2d 910, even though the holder is not a holder in due course, see *International Firearms Co., Ltd.* v. *Kingston Trust Co.,* 6 N.Y. 2d 406, 411, 160 N.E. 2d 656, 658; *Johnson* v. *First State Bank,* 144 Minn. 363, 366, 175 N.W. 612, 613; and *Kohler* v. *First Nat. Bank of Tonasket,* 157 Wash. 417, 422–423, 289 Pac. 47, 49.[3] Moreover, Section 6311(b)(2) of the Internal Revenue Code provides that when a money order tendered in payment of taxes "is not duly paid, the United States shall * * * have a lien

[3] Cases seemingly to the contrary involved special circumstances such as notification that there was no consideration to support the bank draft. See *Mo. Pac. R. Co.* v. *No. Ark. Highway Improv. Dist.,* 168 Ark. 141, 269 S.W. 569.

* * * for the amount of such money order upon all the assets of the issuer thereof * * *."

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
CROMBIE J. D. GARRETT,
CAROLYN R. JUST,
Attorneys.

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